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EXAMINER

FISCHER, ANDREW J

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GROUP 3600

**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Paper No. 16

Application Number: 09/560,320  
Filing Date: April 28, 2000  
Appellant(s): BROWN ET AL.

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Craig Yudell  
For Appellant

**EXAMINER'S ANSWER**

### *Acknowledgements*

#### *Case History*

1. During the examination of this application, there were two (2) office actions on the merits. Following a restriction (Paper No. 5) and election by Applicants (Paper No. 6), a first Office Action on the merits (hereinafter "First Office Action") was mailed January 9, 2003 (Paper No. 7). In response to the First Office Action, Applicants responded with their first response ("First Response") stamped by the USPTO's Office of Initial Patent Examination ("OIPE") as being received on April 10, 2003 (Paper No. 9). A second and final Office Action on the merits ("Final Office Action") was mailed May 20, 2003 (Paper No. 10). An after final response, ("After Final Response") was submitted by Applicants and stamped August 6, 2003 by OIPE (Paper No. 11). An advisory action ("Advisory Action") was mailed to Applicants on August 25, 2003 (Paper No. 13) indicating that the After Final Response would not be entered. Applicants' timely Notice of Appeal was filed on September 23, 2003 (Paper No. 14) while Applicants' appeal brief ("Brief") was filed November 24, 2003 (Paper No. 15). This Answer (Paper No. 16) is in response to Applicants' Brief and is now before the USPTO's Board of Patent Appeals and Inferences ("the Board").
2. For reference purposes, capitalized versions of Appellants (and Applicants) refer to the Appellants in this case while lower case versions of either applicant(s) or appellant(s) refers generally to any applicant(s) or appellant(s). Likewise, capitalized versions of 'Examiner' refer to the examiner in this particular application while lower case versions of 'examiner' refer generally to any examiner.

***Issues***

7. The Applicants' statement of the issues in their Brief is substantially correct. Applicants' issue #2 should include claim 16. Claim 41 has been cancelled (See Amendment 'A', Paper No. 9).

***Grouping Of Claims***

8. The rejection of all pending claims 15, 16, 18-26, and 38 stand or fall together because Applicants state that the claims stand or fall together as two groups.

9. The rejection of claim 26 stands or falls together because Applicants' Brief does not include a statement that this claim does not stand or fall together and reasons in support thereof. See 37 C.F.R. §1.192(c)(7). Because of this, should the rejection under 35 U.S.C. §112 for claim 15 be affirmed by the Board, then the rejection of all claims is affirmed.

10. Although there are two independent claims currently pending, the Examiner agrees with Applicants that *all* claims stand or fall together with claim 15. In accordance with Applicants' request, only the rejections of claim 15 will be addressed.

***Summary Of Invention***

11. The summary of invention contained in the Brief is substantially correct.

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***Appealed Claims***

12. The copy of the appealed claims contained in Applicants' Appendix to their brief is correct.

***Art Relied Upon***

13. The Following art is pertinent to discussion contained within this Answer.

6,204,763 B1	Sone	3-2001
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6,341,271 B1	Salvo et. al.	1-2002
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White, Ron, How Computers Work, Millennium Ed. Que Corporation, 9/1999.

Derfler, Frank J. et. al. How Networks Work, Millennium Ed., Que Corporation, 1/2000.

Gralla, Preston, How the Internet Works, Millennium Ed., Que Corporation, 8/1999.

***Rejections***

14. Claims 15, 16, 18-26, and 38 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claims contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention.

15. Claims 15, 16, 18-25, and 38 are rejected under 35 U.S.C. §102(e) as being anticipated by Sone (U.S. 6,204,763 B1).

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16. Claims 15, 16, 18-25, and 38 are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Sone.

17. Claim 26 is rejected under 35 U.S.C. §103(a) as being unpatentable over Sone in view of Salvo et. al. (U.S. 6,341,271)("Salvo"). Additionally, the Final Rejection noted:

Regarding the rejection of claim [26] using Sone in view of Salvo, the Examiner notes that Applicant has not made any *additional* arguments pertaining to this rejection. Because Applicant has not pointed out the supposed errors in the rejection as required by 37 C.F.R. §1.111(b), the Examiner acknowledges the current allowability of claim [26] stands or falls with the allowability of claim 15.<sup>1</sup>

18. The Examiner also finds that Applicants have not made any additional arguments in their Brief regarding claim 26. Because Applicants have acknowledged this rejection, Applicants' Brief is not defective even though Applicants fail to discuss this rejection. See *e.g. Ex parte Knapton*, 67 USPQ2d 1062, 1064 (B.P.A.I. 2002) (unpublished) (noting that because appellant "acknowledged" the examiner's indefiniteness rejection, appellant's appeal brief was not defective even though appellant never discussed the indefiniteness rejection).

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<sup>1</sup> Final Office Action, Paper No. 10, Paragraph No. 27, Pages 17 and 18.

## RESPONSE TO ARGUMENTS

### *Issues in this Appeal*

19. The Examiner recognizes that the Board has the power to examine or reexamine patent claims and raise issues sua sponte. "The members of the Board of Appeals are denominated 'examiners-in-chief' in both 35 U.S.C. 3 ('Officers and employees') and 35 U.S.C. [6]. The title chosen by the Congress implies that the members of the board have authority to *examine or reexamine* appealed claims. [Emphasis in original]." *In re Loehr*, 500 F.2d 1390, 1392-93, 183 USPQ 56, 58 (CCPA 1974). However it also well known that arguments which Applicants could have made but chose not to make in their Brief should not be considered by the Board. See 37 C.F.R. §1.192(a) ("Any arguments or authorities not included in the brief will be refused consideration by the Board of Patent Appeals and Interferences, unless good cause is shown.").

20. The Examiner also notes that the Board is titled the "Board of Appeals"<sup>2</sup> and not the 'Board of Initial Examination.' By restricting the Board to only *appeals*, the Board's valuable time is not be wasted. Furthermore, while the Examiner recognizes that due process is an important consideration of the USPTO, Applicants are not before the Board pro se and are represented by presumptively competent counsel who could have raised any issue deemed meritorious to their case prior to initial appeal brief.

21. In light of the above and because the Examiner is not aware of any "good cause" as required by 37 C.F.R. §1.192(a), the Examiner respectfully requests the Board to refrain from

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<sup>2</sup> The formal name as established in 35 U.S.C. §6(a) is the "Board of Patent Appeals and Interferences"

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addressing issues sua sponte. While the Board clearly has the authority to raise such issues, a decision by either Applicants or the Examiner on whether or not to raise a particular issue was formed only after careful consideration of the extensive administrative record. Other issues may have been contemplated and investigated by Applicants or the Examiner yet not found in the written record because such arguments were considered unsupportive, weak, or tangential to the issues presented herein.

***After Final Amendment***

22. The Examiner notes that Applicants argue that “it would have been proper for the Examiner to enter the proposed amendment . . . .”<sup>3</sup> However this issue is not appealable to the Board.

The refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion. . . . This court [the Federal Circuit], like the Board of Appeals, does not consider the issue of whether the examiner’s refusal to enter the proposed amendment after final rejection constituted an abuse of discretion on his part. . . . There are a host of various kinds of decisions an examiner makes in the examination proceeding—mostly matters of a discretionary, procedural or nonsubstantive nature—which have not been and are not now appealable to the board or to this court when they are not directly connected with the merits of issues involving rejections of claims, but traditionally have been settled by petition to the Commissioner.” *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted).

23. Because the Board does not have subject matter jurisdiction on this issue, the Examiner will not address Applicants’ arguments.

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<sup>3</sup> Applicants’ Brief, Paper No. 15, Page 2.



*Summary Of Examiner's Arguments*

24. With respect to claim 15, the Examiner presents two alternative arguments in this Answer. Under the first argument (*Section I*), the 35 U.S.C. §112 1<sup>st</sup> paragraph rejection having new matter ("the new matter rejection") is presented. If the Board affirms the new matter rejection for claim 15, the rejection of all claims must be affirmed.

25. Alternatively, under the Examiner's second argument (*Section II*), the new matter rejection for claim 15 is reversed but the anticipation (or obviousness) rejection of claim 15 is affirmed. Should this occur, the Board must apply the same standard of interpretation and inherency to the prior art rejections as it did to the new matter rejection (*Section I*). In other words, if the Board adopts Applicants' arguments that the new matter is inherent in Applicants' original disclosure, the same arguments apply equally to the prior art rejections. In that case, the Board should then affirm the anticipation (or obviousness) rejection of claim 15. And like the new matter rejection, if the Board affirms the anticipation (or obviousness) rejection for claim 15, the rejection of all claims must be affirmed because all claims stand or fall together with claim 15.

26. Regarding the anticipation or obviousness rejections, the Examiner first points out that all pending claims are rejected under 35 U.S.C. §102(e) as being anticipated by Sone. It is the Examiner's principle position that the claims are anticipated because of the inherent features in Sone. However if the Board reverses the anticipation rejections, the Examiner alternatively has rejected all pending claims as being obvious in view of Sone.

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For example and regarding the anticipation rejections in particular, a notebook computer or laptop computer is a form of personal computer. If the Board finds that a notebook computer or laptop computer is inherent in Applicants' original disclosure—under the same principles of inherency—the Board must also find that a notebook computer or laptop computer is inherently disclosed in the “personal computer” disclosed in Sone.

27. In summary, under either interpretation noted above (§112 or prior art), claim 15 remains rejected. Because at least one rejection of claim 15 must be affirmed, the Board must then conclude that the rejection of all pending claims must be affirmed.

28. Finally *Section III* in this Answer addresses Applicants' arguments made in their Brief. After careful review of the all the evidence of record, the Examiner maintains their rejections and notes the following.

***Section I: 35 U.S.C. §112 1<sup>st</sup> Paragraph Rejection***

29. “The purpose of the written description requirement is to prevent an applicant from later asserting that he invented that which he did not; the applicant for a patent is therefore required to recount his invention in such detail that his future claims can be determined to be encompassed within his original creation.” *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 65 USPQ2d 1385, 1397 (Fed. Cir. 2003) (citations and quotations omitted).

Moreover, “[t]he issue of whether a patent specification adequately describes the subject matter claimed is a question of fact.” *In re Alton*, 76 F.3d 1168, 1171-72, 37 USPQ2d 1578, 1580 (Fed. Cir. 1996) (citations omitted). However, “the invention claimed does not have to be

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described in *ipsis verbis* in order to satisfy the description requirement of § 112.” *In re Lukach*, 442 F.2d 967, 169 USPQ 795, 796 (CCPA 1971).

30. The Final Office Action stated:

After careful review of the originally filed specification, it is the Examiner’s position that Applicant has not disclosed “a personal electronic memory digital data storage device carried on the person of said particular user . . . .” It is also the Examiner’s factual determination that because Applicant does not even mention in his originally filed specification that the data storage device is carried on the person of a particular user, Applicant has also not disclosed the claimed subject matter in an embodiment of the invention. “If the Applicant claims embodiments of the invention that are completely outside the scope of the specification, then the examiner or Board need only establish this fact to make out a *prima facie* case.” *In re Alton*, 76 F.3d 1168, 1175, 37 USPQ2d 1578, 1583 (Fed. Cir. 1996).<sup>4</sup>

31. While the Examiner agrees with Applicant’s arguments that “a personal electronic memory digital data storage device carried on the person of said particular user” may be *obvious* in view of Applicant’s disclosure, this nevertheless does not satisfy the written description requirement. “Entitlement to a filing date does not extend to subject matter which is not disclosed, but would be obvious over what is expressly disclosed. It extends only to that which is disclosed.” *In re Huston*, 308 F.3d 1267, 1277, 64 USPQ2d 1801, 1807 (Fed. Cir. 2002) citing *Lockwood v. Am. Airlines Inc.*, 107 F.3d 1565, 1571-72, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997).

32. Applicants argue that it is “well known by those skilled in the art a “SmartCard” or “ibotton” is designed to be carried on the person of a user, and therefore there is clearly inherent

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<sup>4</sup> Final Office Action, Paper No. 10, Paragraph No. 10, Page 6.

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support in the specification for the claimed limitation of ‘carried on the person of said particular user.’”<sup>5</sup>

33. First, Applicants have not presented any evidence that an “ibotton” is carried on the person of said particular user. Because the record does not provide adequate evidence to support Applicants’ conclusion that an “ibotton” is carried on the user, Applicants’ arguments have been considered but are not persuasive.

34. Applicants next argue a “smartcard” is carried on a user and cites a dictionary definition for smartcard. While the Examiner finds that Applicants’ definition of a smartcard is appropriate,<sup>6</sup> the definition fails to convey information about whether or not the smartcard is carried on a user. In other words, a smartcard does not *necessarily* have to be carried by a user. Because the evidence of record does not adequately support Applicant’s conclusion that a “smartcard” is necessarily carried on a user, Applicants’ arguments have been considered but are not persuasive.

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<sup>5</sup> Applicant’s Brief filed November 24, 2003, Paper No. 15, Page 9.

<sup>6</sup> Based on Applicant’s disclosure, all the art of record, and the knowledge of one of ordinary skill in this art as determined by the factors discussed in MPEP §2141.03 (where practical), the Examiner finds that the *Microsoft Press Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See *e.g. Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used the *Microsoft Press Computer Dictionary* (3d ed.) as “a technical dictionary” to define the term “flag.” See also *In re Barr*, 444 F.2d 588, 170 USPQ 330 (CCPA 1971)(noting that its appropriate to use technical dictionaries in order to ascertain the meaning of a term of art) and MPEP §2173.05(a) titled ‘New Terminology.’

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35. Applicants finally argue “that those skilled in the art would define notebooks, palmtops, cell phones and PDAs as designed and adapted to be carried on the person of a user.”<sup>7</sup> First, whether or not these objects are ‘adapted to be’ carried on a user is immaterial to this discussion because “adapted to” is not present in the claims. Claim 15 expressly states that the “personal electronic digital data storage device carried on the person of said particular user . . . .” There is no ‘designed’ or ‘adapted to’ language. As Judge Clevenger has so eloquently summarized these types of arguments, “The invention disclosed in [Applicant’s] written description may be outstanding in its field, but the name of the game is the claim.” *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998).

36. Furthermore, the Final Office Action stated:

Under the broadest reasonable interpretation standard noted above, the Examiner maintains his interpretations. However, to the extent that the Examiner’s interpretations are either different from or in dispute with Applicant’s interpretations, the Examiner hereby adopts the following definitions as the broadest reasonable interpretation in all his claim interpretations:

***Adjust A1 a:*** to bring to a more satisfactory state: . . . (2) : RECTIFY” Merriam-Webster’s Collegiate Dictionary, 10<sup>th</sup> Edition, Merriam-Webster Inc., Springfield, M.A., 1997.

***Server:*** “2. On the Internet or other network, a computer or program that responds to commands from a client.” Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997. ***Client:*** “3. On a local area network or Internet, a computer that accesses shared network resources provided by another computer (called a *server*).” Id. ***Computer:*** “Any machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” Id.

***Personal computer*** “A computer designed for use by one person at a time.” Id.

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<sup>7</sup> Applicant’s Brief, Paper No. 15, Page 10.

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**Database** "A file composed of records, each containing fields together with a set of operations for searching, sorting, recombining and other functions." Id. "a usu. large collection of data organized esp. for rapid search and retrieval (as by a computer)" Collegiate Dictionary, supra.

**Device** "A generic term for a computer subsystem. Printers, serial ports, and disk drives are often referred to as devices; such subsystems frequently require their own controlling software called device drivers." Computer Dictionary, supra.

**Personal** "1 : of, relating to, or affecting a person: PRIVATE INDIVIDUAL . . . 3 : relating to the person or body." Merriam-Webster's Collegiate Dictionary, supra.<sup>8</sup>

37. Applicants too cite definitions of "notebook computer," "portable computer," and "portable." The Examiner finds these three definitions cited by Applicants to be definitions one of ordinary skill in the art would find appropriate. But again, the definitions are silent as if they are to be carried on a user. The issue then becomes: based upon all the evidence, does Applicants' original disclosure inherently disclose a personal electronic digital data storage device carried on the person of said particular user?

38. In *In re Reynolds*, 443 F.2d 384, 170 USPQ 94 (CCPA 1971) the question of inherency was discussed in relation to 35 U.S.C. §112 1<sup>st</sup> paragraph. The court in

*Reynolds* cited stated:

By disclosing in a patent application a device that inherently performs a function, operates according to a theory, or has an advantage, a patent applicant necessarily discloses that function, theory or advantage even though he says nothing concerning it. The application may later be amended to recite the function, theory or advantage without introducing prohibited new matter. [Citations omitted.] *Reynolds*, 170 USPQ at 98.

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<sup>8</sup> Final Office Action, Paper No. 10, Paragraph No. 16, Pages 12 and 13.

39. The test for inherency thus becomes: was the inherent element necessarily present in Applicants' disclosure? In other words, do those products necessarily have to be carried on the person of said particular user? The answer is simply no. They do not *necessarily* have to be carried on the person of said particular user. While personal computers, laptop computers, notebook computers, and portable computers *may* be carried on a user, they do not *necessarily* have to be carried on the person of said particular user. Smartcards, personal computers, laptop computers, notebook computers, and portable computers could exist and be used throughout the product's entire lifespan without ever being carried by the particular user.

The Examiner concludes that because they do not "necessarily" have to be carried on the person of said particular user, smartcards, personal computers, laptop computers, notebook computers, and portable computers carried on the person of said particular user are not disclosed in Applicants' original disclosure in manner which would comply with 35 U.S.C. §112 1<sup>st</sup> paragraph. For these reasons, the 35 U.S.C. §112 1<sup>st</sup> paragraph rejection should be affirmed. And if the Board affirms the Examiner on the new matter rejection, the rejection of all pending claims must also be affirmed because all pending claims stand or fall with claim 15.

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***Section II: Claim 15 is Anticipated by Sone or Obvious in view of Sone***

40. Claims 15 stands rejected under 35 U.S.C. 102(e) as being anticipated by Sone.

Anticipation is a question of fact. *In re Hyatt*, 211 F.3d 1367, 54 USPQ2d 1664, 1667 (Fed. Cir. 2000); *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 814-15 (1869). “To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently.” *In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997).

“The dispositive question regarding anticipation is whether one skilled in the art would reasonably understand or infer from the prior art reference’s teaching that every claim limitation was disclosed in that single reference.” *Akamai Technologies Inc. v. Cable & Wireless Internet Services Inc.*, 68 USPQ2d 1186, 1190 (Fed. Cir. 2003)(citations and quotations omitted).

41. Additionally, “[I]t is axiomatic that claims are construed the same way for both invalidity and infringement.” *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330, 65 USPQ2d 1385, 1396 (Fed. Cir. 2003) (citation omitted) (stating that a claim must be construed the same for infringement and invalidity under 35 U.S.C. § 112 ¶ 1).<sup>9</sup> Under this line of reasoning, if the Board finds the “personal electronic digital data storage device carried on the

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<sup>9</sup> While ex parte examination does not concern infringement, this reasoning is still applicable using the long recognized principle of: “that which infringes if later, anticipates if earlier . . . .” *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1573, 229 USPQ 561, 574 (Fed. Cir. 1986) citing *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889). As between infringement and anticipation (*i.e.* patentability) during ex parte examination, it is patentability which is the USPTO’s concern, not infringement. “The business of the PTO is patentability, not infringement.” *In re Hogan* 559 F.2d 595, 607, 194 USPQ 527, 538 (CCPA 1977).



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person of said particular user" is inherent in Applicant's disclosure (*i.e.* reversing the new matter rejection), the Board must also find the same features inherent in Sone.

### *The Sone Disclosure*

42. Sone discloses a household automatic replenishment system with both refrigerated and unrefrigerated compartments. Sone also directly discloses:

[A]n automated inventory system maintains a desired inventory of the household consumable items and comprises a plurality of sensors configured to provide information representative of an inventory of the refrigerated compartment and the unrefrigerated compartment. The sensors provide an indication of the presence and/or weight of desired household consumable items.

The automated inventory system further comprises an inventory processor coupled to the sensors for processing the information representative of the inventory of the refrigerated compartment and the unrefrigerated compartment, so as to make a list of those items which are to be replenished. Household consumable items may be replenished when either a quantity or weight thereof falls below a desired inventory level or threshold.

An automated ordering system comprises a telecommunications device which is coupled to cooperate with the inventory processor so as to communicate at least a portion of the list of items to be replenished made by the inventory processor to at least one vendor. In this manner, one or more vendors are notified of an order for those household consumable items which are necessary to maintain the desired inventory thereof. The vendor then either delivers or has delivered the required items. [C2, 51 through C3, L7].

The inventory processor preferably comprises a dedicated computer, which is built into a common cabinet, along with the refrigerated compartment and the unrefrigerated compartment. The inventory processor thus comprises a program which monitors the sensors, so as to determine the actual inventory of desired household consumable items. The actual inventory is compared to a desired inventory, and a list is made of those items which are part of the desired inventory, but are not present in the actual inventory. [C3, L57-L65].

Alternatively, the inventory processor comprises a personal computer which communicates with the sensors, preferably via an interface which is built into the cabinet. The interface performs any necessary signal conditioning and/or

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connectively, so as to provide an output which is compatible with the personal computer. Alternatively, the interface may be omitted and the personal computer configured to communicate directly with the sensors. [C4, L5-L2].

In any instance, the refrigerator optionally comprises a smart ordering terminal, whereby a person may modify a preexisting inventory processor generated replenishment list or may place an order entirely independent of the inventory processor. Thus, when a replenishment list is displayed upon a display of the refrigerator, for example, a person may add items to or delete items from the list, as desired. Further, the user may generate a separate order list, comprised of items which may not even be part of the normal household inventory, so as to effect automatic ordering of the desired items.

Further, the standard household inventory is preferably modifiable via either a touch screen display (preferably the display of the refrigerator itself) or via a personal computer. [C4, L52-L65].

Referring now to FIG. 4, the second preferred embodiment of the household consumable item automatic replenishment system, including intelligent refrigerator, is similar to the first embodiment thereof, except that instead of a dedicated, built-in computer, the second embodiment of the present invention comprises an interface 43 for facilitating communication between the sensors 31 and a personal computer 50, such as an IBM compatible personal computer or an Apple Macintosh, for example. The interface 43 is preferably coupled to the personal computer 50 via an IEEE-1394 cable, a RS-232 cable or the like. The interface 43 performs any signal conditioning, routing, processing or connectivity functions which are necessary to make the sensors 31 compatible with the personal computer 50, according to well known principles. The personal computer 50 performs the inventory processing function and then transmits a list of items to be replenished via interface communication link 34 to the store shopping server 24 in the same manner that the dedicated, built-in computer 26 of the first embodiment of the present invention does.

Preferably, desired information such as present inventory, an order list, and a list of those items which will require ordering soon, are displayed upon the display 42 of the indoor access 13 as discussed above. However, these items, as well as in any additional desired information, may either additionally or alternatively be displayed upon a monitor of the personal computer 50.

The present invention may optionally comprise an intelligent refrigerator which does not necessarily include an unrefrigerated portion and which does not necessarily have both indoor and outdoor accesses thereto. Rather, the intelligent refrigerator comprises an inventory processor, such as that of built-in computer 26 or personal computer 50, which, in cooperation with sensors 31, provides an alert (either auditory or visual) that food items are about to spoil or have already

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spoiled, such as via either a built-in display 42 or a display of the personal computer 50. Optionally, automatic reordering of items which have spoiled or are about to spoil is facilitated via the inventory processor, as well. Further, automatic ordering of items whose inventory is below a desired level or threshold is also facilitated, as described above.

A menu system (facilitated by computer 26, 50) preferably allows the user to assign desired food items to specific sensors 31, and to set desired quantity or weight thresholds, as well as freshness expiration periods. [C7, L45 through C8, L23].

The display 42 optionally comprises a touch screen display which facilitates easy modification of the list of items to be replenished. A touch screen display also may be used to allow a person to place an order independent of the inventory processor. Thus, a person may place an order for items required for a specific meal, for example. Thus, according to the preferred embodiment of the present invention, the refrigerator further comprises an intelligent ordering terminal. [C9, L32-L40].

It is understood that the exemplary household consumable item automatic replenishment system, including intelligent refrigerator, described herein and shown in the drawings represents only a presently preferred embodiment of the invention. Indeed, various modifications and additions may be made to such embodiment without departing from the spirit and scope of the invention.. [C9, L41-L48].

43. In particular, Sone discloses all the claimed features as noted in Table 1 (See Appendix in this Answer). In other words, in light of Table 1, one of ordinary skill in the art would reasonably understand or infer from Sone's teachings that every claim limitation was disclosed either directly or inherently within Sone.

*Construing the Claims*

44. Before discussing claim 15 in reference to Sone, Applicants are reminded that during examination, claims are given their "broadest reasonable interpretation . . . consistent with the specification." *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Prater*, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550-51 (CCPA 1969).<sup>10</sup>

45. Furthermore, it is the Examiner's position that as long as the Examiner's interpretation is reasonable, the Examiner can use his interpretation to reject a claim and thus establish a prima facie case of anticipation (or obviousness) even if the Examiner's interpretation is different from Applicants. One way (yet not the only way) the Examiner can show his interpretation is reasonable is by pointing to sources to support his interpretation. *Morris*, 127 F.3d at 1056, 44 USPQ2d at 1029 ("Absent an express definition in their specification [*i.e.* lexicography], the fact that appellants can point to definitions or usages that conform to their interpretation does not make the PTO's definition unreasonable when the PTO can point to other sources that support its interpretation."). And in this case, a dictionary definition is that other source.

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<sup>10</sup> See also MPEP §2111; *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

### *Using Dictionary Definitions*

46. “It is well settled that dictionaries provide evidence of a claim term’s ordinary meaning. Such dictionaries include dictionaries of the English language, which in most cases will provide the proper definitions and usages, and technical dictionaries, encyclopedias and treatises, which may be used for established specialized meanings in particular fields of art.” *Inverness Medical v. Biomeditech Co.*, 309 F.3d 1365, 1369, 64 USPQ2d 1926, 1930.<sup>11</sup> However, it must be kept in mind that dictionary definitions are not alone determinative. See *e.g. Brookhill-Wilk I LLC v. Intuitive Surgical Inc.*, 334 F.3d 1294, 1300, 67 USPQ2d 1132, 1137 (Fed. Cir. 2003) (noting that abstract dictionary definitions are not alone determinative; “resort must always be made to the surrounding text of the claims in question”).

47. With this in mind, even though “food-related inventory preferences” is not found ‘as written’ in a dictionary, this does not mean that the ordinary meaning of individual claim words should be ignored. In other words, “simply because a phrase as a whole lacks a common meaning does not compel a court to abandon its quest for a common meaning and disregard the established meanings of the individual words.” *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1372, 65 USPQ2d 1865, 1871 (Fed. Cir. 2003) (citations omitted).

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<sup>11</sup> See also *Inverness Medical v. Warner Lambert Co.*, 309 F.3d at 1378, 64 USPQ2d at 1936 (“We begin claim construction analysis with the ordinary meaning of the disputed claim term. It is well settled that dictionary definitions provide evidence of a claim term’s ordinary meaning. Potentially relevant dictionaries include dictionaries of the English language (providing general definitions and usages) and technical dictionaries, encyclopedias, and treatises (providing specialized meanings as used in particular fields of art).”) (citations and quotations omitted); and *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202, 64 USPQ2d 1812, 1818 (Fed. Cir. 2002) (“For such ordinary meaning, we turn to the dictionary definition of the term.”)

48. In this case, “food-related,” “inventory,” and “preferences” are not ‘technical terms’ and thus the Examiner finds that a common dictionary definition is sufficient. The Examiner adapts the term “preference” to mean “1 a : the act of preferring” Merriam-Webster’s Collegiate Dictionary, 10<sup>th</sup> Edition, Merriam-Webster Inc., Springfield, M.A., 1997.<sup>12</sup> ‘Prefer’ to mean “2 : to like better or best”. *Id.* Next ‘inventory’ is defined as “1 a (2) : a list of goods on hand”. *Id.* The Examiner construes “food-related inventory preferences” to mean ‘a list of food-related goods on hand that the user likes better or best.’

***Claim 15 is Anticipated By Sone***

49. In light of Table 1 (See Appendix in this Answer), the Examiner concludes that he has established a prima facie case of anticipation for claim 15.

50. In particular, the second preferred embodiment of Sone (see Figure 4 in Sone) directly discloses a “personal computer 50” yet is silent as to what devices are inside personal computer 50. Based upon the Examiner’s definition of a personal computer, *supra*, personal computer 50 must (by definition) have at least *some* electronic storage devices. If it did not have such devices, it would not be a personal computer.

51. The Examiner also concludes that personal computer 50 is an ordinary personal computer. Applicants are reminded that “a reference must be considered not only for what it expressly teaches, but also for what it fairly suggests . . . .” *In re Bell*, 991 F.2d 781, 785, 26

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<sup>12</sup> See page 19a of the Collegiate Dictionary under the section titled “Definitions” describing the use of a colon and noting that “A boldface colon is used in this dictionary to introduce a definition: . . . It is also used to separate two or more definitions of a single sense.”

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USPQ2d 1529, 1532 (Fed. Cir. 1993) (citations and quotations omitted). Therefore Sone is not limited to simply “personal computer 50.” See, e.g., *Ultradent Prods., Inc. v. Life-Like Cosmetics, Inc.*, 127 F.3d 1065, 1068, 44 USPQ2d 1336, 1339 (Fed. Cir. 1997) (error to construe prior art disclosure as limited to the preferred embodiment). Sone fairly suggests that all the old and well known components or devices which are within an ordinary personal computer are inherently disclosed. In this case, the internal components or devices of personal computer 50 (or any personal computer) are basic knowledge and/or common sense.

52. “The law is clear that patent documents need not include subject matter that is known in the field of the invention and is in the prior art, for patents are written for persons experienced in the field of the invention. ... To hold otherwise would require every patent document to include a technical treatise for the unskilled reader.” *S3 Inc. v. nVIDIA Corp.*, 259 F.3d 1364, 1371, 59 USPQ2d 1745, 1749-50 (Fed. Cir. 2001) citing *Vivid Technologies, Inc. v. American Science and Engineering, Inc.*, 200 F.3d 795, 804, 53 USPQ2d 1289, 1295 (Fed. Cir. 1999) (“patents are written by and for skilled artisans”). That is to say, a skilled artisan would not elaborate as to the contents of the personal computer 50 in Sone or other basic knowledge known to those of ordinary skill. Therefore Sone is not required to expressly recite each and every component or device of personal computer 50. In fact, if Sone intended personal computer 50 to have components or devices other than those of an ordinary personal computer, Sone would have directly disclosed those components or devices.

53. The Examiner finds that it is basic knowledge and common sense that a personal computer comprises at least a removable drive, a CD-ROM or DVD drive, a tape drive, a hard

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drive, and floppy drive. To support the Examiner's finding of basic knowledge and/or common sense, the Examiner noted the following in the Final Office Action:

In accordance with *In re Lee*, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner cites How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla as additional evidence of what is basic knowledge or common sense to one of ordinary skill in the art. Each reference is cited in its entirety.<sup>13</sup>

54. After careful review of Applicants' Brief, the Examiner notes that Applicants have not pointed out the supposed errors in this statement in accordance with 37 C.F.R. §1.111(b)<sup>14</sup> nor provided any evidence to rebut this finding.

55. Additionally, because these three references are directed towards beginners (see *e.g.* "User Level Beginning . . ." in How Computers Work, outside cover page), because of the references' basic content (which is self-evident upon review of the references), and after further review of the entire application and all the art now of record, the Examiner finds that these three references are primarily directed towards those of low skill in this art. Because these three references are directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within these three references.


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<sup>13</sup> Final Office Action, Paper No. 10, Paragraph No. 31, Page 19.


<sup>14</sup> For examples of how the USPTO interprets 37 C.F.R. §1.111(b), see *e.g.*: MPEP §818.03(a) noting that applicant is required to point out the supposed errors in the next response by stating *why* the Examiner's position regarding restriction is *substantively* incorrect in order to preserve his or her right to petition; MPEP §2144.03 regarding official notice requiring applicant to point out the supposed errors in his or her next response or the official noticed statement is taken as



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56. In particular, How Computers Work directly discloses at least 27 elements within a "personal computer" [How Computer Work, Pages 12 and 13]. Elements 4-7 of the personal computer are a removable drive (3), a CD-ROM or DVD drive (4), a tape drive (5), a hard drive (6), and floppy drive (7). Anyone of these devices clearly meets the limitation of "a personal electronic digital data storage device carried on the person of said particular user proffered by said particular user." At the very least, "removable drives" or "floppy drives" and diskette clearly meet this limitation.



57. Whatever this storage device is (*e.g.* a hard drive, a floppy drive, a zip drive, etc.), this storage device is carried by a user. Even hard drives are carried by a user. Although they make take a little more effort to install, they are clearly capable of being carried by a user. To be clear, the second receiving step in claim 15 *does not actually require* the storage device to be on the user when the "receiving" step occurs since the device must be "proffered" by the particular user after carrying.

For example, Applicants' own disclosure states that in at least one embodiment (page 19) the personal storage device 60 is coupled to the personal storage device adapter 64. In this case, the storage device 60 is removed from the user's pocket (or other storage area) so it may be connected to device adapter 64. The second "receiving" step in claim 15 does not require personal storage device 60 to *actually be on the user* when the "receiving" step occurs.

58. Finally, it is immaterial as to whether or not How Computers Work was cited in the rejection because the reference is cited simply for its *basic knowledge and common sense*. In

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admitted prior art; and *In re Goodman*, 3 USPQ2d 1866, 1871 (ComrPats 1987) noting that an

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other words, its common sense that a personal computer contains at least one removable drive, a hard drive, a floppy drive, a zip drive, etc.

59. As noted in *Section I* above, because the Board found that the "personal electronic digital data storage device carried on the person of said particular user" was inherent in Applicants' disclosure,<sup>15</sup> the same reasoning applies to Sone and How Computer's Work. The same reasoning would also make the "personal electronic digital data storage device carried on the person of said particular user" inherent in personal computer 50 as disclosed in Sone.

***A Laptop or Notebook Computer is a Personal Computer***

60. A laptop or notebook computer is a personal computer carried on a user and would also anticipate claim 15. To be clear, after a review of all the evidence of record, a preponderance of this evidence<sup>16</sup> suggests that personal computer 50 includes removable drives, hard drives, or floppy drives. Alternatively, the entire personal computer 50 is carried by the user (*i.e.* the personal computer in Sone is a laptop or notebook computer). In other words, just as Applicants argue a laptop is inherently "a personal electronic digital data storage device carried on the person of said particular user proffered by said particular user," the personal computer 50 is also a laptop or notebook computer. Clearly, all the definitions of record support this conclusion.

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applicant is required to point out substantively *any* supposed errors in his or her next response.

<sup>15</sup> If this were not true, this discussion of the prior art rejections is moot since the Examiner can rely strictly on the new matter rejections to affirm at least one rejection of all pending claims.

<sup>16</sup> See *In re Epstein*, 32 F.3d 1559, 1564, 31 USPQ2d 1817, 1820 (Fed. Cir. 1994) ("Preponderance of the evidence is the standard that must be met by the PTO in making rejections.")

61. As noted earlier, the claims must be construed the same way for both written description (validity) and anticipation (infringement). *Amgen Inc. v. Hoechst Marion Roussel*, 314 F.3d at 1330, 65 USPQ2d at 1396. So if Applicants' disclosure inherently discloses a notebook computer—under the same principles of inherency—personal computer 50 must also inherently disclose a notebook computer. Based upon Applicants' definition of notebook computer<sup>17</sup> and the Examiner's definition of 'personal computer,' *supra*, a notebook computer is but one form of a personal computer. For these reasons, Sone anticipates claim 15.

#### ***Alternative Obviousness Rejections***

62. All pending claims are alternatively rejected as being obvious in view of Sone. The Final Office Action directly stated:

Claims 15-25, 38, and 41 are alternatively rejected under 35 U.S.C. 103(a) as being unpatentable over Sone.<sup>18</sup> It is the Examiner's principle position that use of the automatic replenishment system in multiple homes (or households) is inherent in Sone and therefore anticipated as noted above.

Alternatively, if not inherent, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Sone to include the system in multiple homes. Such a modification would have made system profitable for the vendors and delivery persons since they would never make money if the system was for a single home.

Furthermore, the placement of the automatic replenishment system in multiple homes is merely duplicating an easily delineated and expressly described embodiment in Sone. Mere duplication of parts has no patentable significance

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<sup>17</sup> Applicant's Brief, Paper No. 15, Page 10.

<sup>18</sup> See MPEP §2112 expressly authorizing alternative 102/103 rejections when the question of inherency is present in the §102 rejection.

unless a new and unexpected result is produced. See MPEP §2144.04 VI *B* or *In re Harza*, 47 CCPA 771, 274 F.2d 669, 124 USPQ 378 (CCPA 1960).<sup>19</sup>

### ***Section III: Response to Applicant's Arguments***

#### ***Summary of Applicant's Arguments***

63. Applicants make at least 5 arguments with respect to the prior art rejections. Applicants' first three arguments are directed towards the anticipation rejections. Applicants' forth and fifth arguments are directed towards the obviousness rejections. The Examiner has considered all arguments but they are found unpersuasive.

#### ***Applicant's First Argument: "Food-Related Inventory Preferences"***

64. Applicants argue that food objects stored within Sone (*e.g.* ice cream) is not an inventory preference. Specifically, Applicants argue that "such a reading is not consistent with a reasonable interpretation of the claims or how persons of ordinary skill in the art would read the claims/specification."<sup>20</sup> Even assuming this statement of law is valid, the Examiner respectfully disagrees.

65. First, Applicant's implied statement of law that the claims must be interpreted as to how "a person of ordinary skill in the art would read the claims/specification" is incorrect in this context. Even using the proper application of this rule, the items chosen by a user are clearly

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<sup>19</sup> Final Office Action, Paper No. 10, Paragraph No. 18, Page 14.

<sup>20</sup> Applicant's Brief, Paper No. 15, Page 6.

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inventory preferences. Second, Applicants offer no evidence (other than their specification) that one of ordinary skill in the art would interpret the claims in a manner contrary to the Examiner's interpretation. Applicants merely conclude that one of ordinary skill in the art which reach a contrary conclusion.

66. Because Applicants have confused when it is proper to look to the specification, the Examiner will briefly review the this topic.

***So What Does 'In Light of the Specification' Mean?***

67. Before this analysis begins, we must keep in mind the important 'notice function' of the claims. "The claims thus give notice of the scope of patent protection. The claims give notice both to the examiner at the U.S. Patent and Trademark Office during prosecution, and to the public at large, including potential competitors, after the patent has issued." *Johnson & Johnston Associates Inc. v. R.E. Service Co.*, 285 F.3d 1046, 1052, 62 USPQ2d 1225, 1228 (Fed. Cir. 2002) (en banc) (citations omitted). With this in mind and as noted in the Final Office Action and the First Office Action, it is a well accepted principle of claim construction in both inter partes litigation and ex parte examination that the ordinary and customary meaning in the claims is tempered or interpreted "in light of the specification" or "consistent with the specification."

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During litigation, "claims must be read in light of the specification."<sup>21</sup> During examination, claims are given their "broadest reasonable interpretation . . . consistent with the specification."<sup>22</sup>

68. So again, the issue becomes what is meant by "interpreted in light of the specification," "consistent with the specification," "with a view to ascertaining the invention," "looking to the specification to construe claim terms," and other similar language. It is extremely important to remember that although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims.<sup>23</sup> However these familiar canons of claim construction are secondary to the fundamental principle that the claims define the scope of patent protection. *Johnson & Johnston Associates*, 285 F.3d at 1052, 62 USPQ2d at 1228-29 (citations omitted).

69. As in *Teleflex*, the Federal Circuit has restricted the importation of the specification into the claims in some situations while, on the other hand, allowed importation of the specification into the claims in other situations.<sup>24</sup> As a result, these claim misinterpretations continue and

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<sup>21</sup> *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 1270, 59 USPQ2d 1865, 1872 (Fed. Cir. 2001) (citations omitted).

<sup>22</sup> *Morris*, 127 F.3d at 1054, 44 USPQ2d at 1027.

<sup>23</sup> See e.g. *In re Van Guens*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). See also *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186, 48 USPQ2d 1001, 1005 (Fed. Cir. 1998) (citations omitted) ("[W]hile . . . claims are to be interpreted in light of the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claim.").

<sup>24</sup> See e.g. *In re Glaug* 283 F.3d 1335, 62 USPQ2d 1151 (Fed. Cir. 2002) where the court erroneously read the specification into the claim and didn't even mention—let alone analyze—the well established "broadest reasonable interpretation" standard.

become at least one factor (if not a significant factor) in the lack of claim construction predictability.<sup>25</sup> One commentator has suggested that implicit in this lack of claim construction predictability is the conclusion that the reversal rate is far too high for the legal and business communities to have confidence in the predictability of patent infringement lawsuits.<sup>26</sup> In turn, this lack of confidence tends to degrade the entire patent system and one of the pillars upon which our entire intellectual property system is based.

As Professor Moore suggested, practitioners have experimented and attempted to bring order and predictability to this area of patent law. For example, one attempt cautions that should the current trend continue, "patentees and third parties may be unable to ascertain, with any degree of accuracy, the scope of their patent."<sup>27</sup> Others have attempted to break claim interpretation into two main approaches: a "statutory approach" and a "confirmation approach" and call the current doctrine "unsatisfactory."<sup>28</sup> The confusion however continues. As a result, applicants frequently resort to the "in light of the specification argument" when the claims

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<sup>25</sup> Moore, Kimberly A., Are District Court Judges Equipped to Resolve Patent Cases?, 15 Harv. J.L. & Tech. 1 (2001), republished in 12 Fed. Circuit B.J. 1 (2002) where the author concluded there was a 33% reversal rate on claim construction issues before the Federal Circuit resulting in reversing or remanding the case 81% of the time.

<sup>26</sup> Banner, Mark T., Is Markman Right?, The American Bar Association Section of Intellectual Property Law, Chair's Bulletin, Vol. 6, No. 3, (November 2002).

<sup>27</sup> Id. at 459.

<sup>28</sup> Ghatt, Dave A., Kang, Timothy B., *Claim Interpretation: A Regression to Uncertain Times*, 84 J.Pat. & Trademark Off. Soc'y 456, 469 (2002).

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themselves are no longer adequate to support their proffered interpretation. This case represents a classic invocation of that argument.

### *The Solution*

70. When construing "in light of the specification," "consistent with the specification," "with a view to ascertaining the invention," "looking to the specification to construe claim terms," and other similar language, there exists four ways, methods, or factors an applicant or patentee can read the specification into the claims. If an applicant or patentee does not comport his or her arguments into one of the four ways or methods as outlined below, as a matter of law, the phrases "in light of the specification," "consistent with the specification," "with a view to ascertaining the invention," and other similar phrases will have no patentable significance in claim construction. For example, the "looking to the specification to construe claim terms" as stated *Interactive Gift Express, Inc. v. CompuServe, Inc.*, 256 F.3d 1323, 59 USPQ2d 1401, 1407 (Fed. Cir. 2001) means that a reviewing body should look to the specification to see if one of the four methods of reading the specification into the claims as outlined below are present in the case. If none of the four factors are present, it is improper to read the specification into the claims.

Finally, while all four factors are clearly available in inter partes litigation (e.g. a patent infringement suit), the Examiner finds that only Factors #1 and #4 are available during ex parte examination. While a district court may look at a single patent case within a two week time frame allowing the court ample time to investigate all four factors, this is not the case at the



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USPTO. The administrative process at the USPTO—where thousands and thousands of claim interpretations are done every day—demands a bright-line rule which will add certainty to the claim interpretation process.

*The 4 Exceptions: 4 Ways to Get the Specification into the Claims*

There are four (4) ways, methods, or factors (hereinafter “factors”) of reading the specification into the claims. Unless an applicant or patentee can utilize one or more of the these four factors, it is improper to read the specification into the claims.

[We] ... may constrict the ordinary meaning of a claim term in at least one of four ways. First, the claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history. . . . Second, a claim term will not carry its ordinary meaning if the intrinsic evidence shows that the patentee distinguished that term from prior art on the basis of a particular embodiment, expressly disclaimed subject matter, or described a particular embodiment as important to the invention. . . . Third, . . . a claim term also will not have its ordinary meaning if the term chosen by the patentee so deprives the claim of clarity as to require resort to the other intrinsic evidence for a definite meaning. . . . Last, as a matter of statutory authority, a claim term will cover nothing more than the corresponding structure or step disclosed in the specification, as well as equivalents thereto, if the patentee phrased the claim in step- or means-plus-function format. *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366-67, 62 USPQ2d 1658, 1662-63 (Fed. Cir. 2002) (citations and internal quotations omitted).<sup>29</sup>

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<sup>29</sup> The four methods enumerated in *CCS Fitness* are really not new. *CCS Fitness* however was one of the first Federal Circuit cases to clearly and succinctly enumerate all four factors in a single case. For this reason, the Examiner will henceforth refer to these factors, methods, or ways, as ‘the Four *CCS Fitness* Factors’ or the ‘the Four *CCS Fitness* Methods.’

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### CCS Fitness Factor #1

71. In our case, Factor #1 is not at issue. In fact, because lexicography trumps the 'broadest reasonable interpretation,'<sup>30</sup> the Examiner has gone to great lengths to objectively determine that Applicants have decided not to be their own lexicographer. Therefore Factor #1 is not at issue. In the First Office Action the Examiner expressly stated:

After careful review of the specification and prosecution history, the Examiner is unaware of any desire—either expressly or implicitly—by Applicants to be their own lexicographer and to define a claim term to have a meaning other than its ordinary and accustom meaning. Therefore, the Examiner starts with the presumption that all claim limitations are given their ordinary and accustom meaning. See *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 1268, 59 USPQ2d 1865, 1870 (Fed. Cir. 2001)("[T]here is a heavy presumption in favor of the ordinary meaning of claim language as understood by one of ordinary skill in the art."); *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2002) (There is a "heavy presumption that a claim term carries its ordinary and customary meaning."). See also MPEP §2111.01 and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).<sup>31</sup>

In accordance with the ordinary and accustom meaning presumption, during examination the claims are interpreted with their "broadest reasonable

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<sup>30</sup> When an applicant acts as his or her own lexicographer and successfully redefines a claim to have a meaning other than its ordinary and accustomed meaning, the claims must be examined using that meaning. See MPEP §2173.05(a) and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989) ("When the Applicant states the meaning that the claim terms are intended to have, the claims are examined with that meaning, in order to achieve a complete exploration of the Applicant's invention and its relation to the prior art.").

<sup>31</sup> It is the Examiner's position that "plain meaning" and "ordinary and accustom meaning" are synonymous. See e.g. *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001) ("[A]ll terms in a patent claim are to be given their plain, ordinary and accustomed meaning . . .").

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interpretation . . . ." *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).<sup>32</sup>

However, if Applicants wish to use lexicography and desire a claim limitation to have a meaning other than its ordinary and accustomed meaning, the Examiner respectfully requests Applicants in their next response to expressly indicate<sup>33</sup> the claim limitation at issue<sup>34</sup> and to show where in the specification or prosecution history the limitation is defined. Such definitions must be clearly stated in the specification or file history. *Bell Atlantic*, 262 F.3d at 1268, 59 USPQ2d at 1870, ("[I]n redefining the meaning of particular claim terms away from the ordinary meaning, the intrinsic evidence must 'clearly set forth' or 'clearly redefine' a claim term so as to put one reasonably skilled in the art on notice that the patentee intended to so redefine the claim term").<sup>35</sup> The Examiner cautions that no new matter is allowed.

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<sup>32</sup> See also MPEP §2111; *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

<sup>33</sup> "Absent an *express intent* to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning. [Emphasis added.]" *Wenger Manufacturing Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225, 1232, 57 USPQ2d 1679, 1684 (Fed. Cir. 2001) (citations and quotations omitted). "In the absence of an *express intent* to impart a novel meaning to claim terms, an inventor's claim terms take on their ordinary meaning. We indulge a heavy presumption that a claim term carries its ordinary and customary meaning. [Emphasis added.]" *Teleflex Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002) (citations and quotations omitted).

<sup>34</sup> "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements." *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

<sup>35</sup> See also *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582, 39 USPQ2d 1573, 1576 (Fed. Cir. 1996), ("[A] patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, *as long as* the special definition of the term is *clearly stated* in the patent specification or file history. [Emphasis added.]"); *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998) ("Such special meaning, however, must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention."). See also MPEP §2111.02, subsection titled "Applicant May Be Own Lexicographer" and MPEP §2173.05(a) titled "New Terminology."

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Failure by Applicants in their next response to address this issue or to be non-responsive to this issue entirely will be considered a desire by Applicants to forgo lexicography and to continue having the claims interpreted with their ordinary and accustomed meaning and with their broadest reasonable interpretation. Additionally, it is the Examiner's position that above requirements are reasonable.<sup>36</sup> Applicants are also cautioned that even though claim interpretation begins with this presumption, after issuance the prosecution history may further limit claim scope if Applicants disclaim or disavow a particular interpretation of the claims during prosecution. *Abbott Laboratories v. TorPharm Inc.*, 300 F.3d 1367, 1372, 63 USPQ2d 1929, 1931 (Fed. Cir. 2002).<sup>37</sup>

72. The Examiner followed up in the Final Office Action by reaffirming his position taken in the First Office Action:

The Examiner notes that Applicant has decided not to be his own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. Specifically, after receiving express notice in the previous Office Action<sup>38</sup> of the Examiner's position that lexicography is *not* invoked, Applicant has not pointed out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicant has not argued lexicography *is* invoked). To further support the Examiner's position that Applicant is not his own lexicographer, it is the Examiner's factual determination that not only has Applicant not pointed to definitional statements in his specification or prosecution history, Applicant has also not pointed to a term or terms in a claim with which to draw in those statements.<sup>39</sup> Finally and to be sure of Applicant's intent, the

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<sup>36</sup> The requirements are reasonable on at least two separate and independent grounds: first, the Examiner's requirements are simply an express request for clarification of how Applicants intend their claims to be interpreted. Second, the requirements are reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21<sup>st</sup> Century Strategic Plan, June 3, 2002 available at [www.uspto.gov/web/offices/com/strat2001/index.htm](http://www.uspto.gov/web/offices/com/strat2001/index.htm).

<sup>37</sup> First Office Action, Paper No. 7, Paragraph No. 10.

<sup>38</sup> See the Examiner's previous Office Action mailed January 9, 2003, Paper No. 7, Paragraph No. 10.

<sup>39</sup> "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to

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Examiner also notes that Applicant has declined the Examiner's express invitation<sup>40</sup> to be his own lexicographer.<sup>41</sup> Accordingly and for due process purposes, the Examiner gives notice that for the remainder of the examination process and unless expressly noted otherwise by the Examiner, the heavy presumption in favor of the ordinary and accustomed meaning is not overcome; the claims therefore continue to be interpreted with their "broadest reasonable interpretation . . . ." *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).<sup>42</sup> The Examiner now relies heavily and extensively on this interpretation.<sup>43</sup> See e.g. *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1381, 62 USPQ2d 1865, 1877 (Fed. Cir. 2002) ("Because the patentee has not chosen to be his own lexicographer in this instance, [the claimed element] should carry its ordinary meaning . . . .")(Clevenger, J. dissenting in part). Unless expressly noted otherwise by the Examiner, the preceding claim interpretation principles in this paragraph apply to all examined claims currently pending.

73. Because Applicants have decided not to be their own lexicographer and because Applicants have not even *attempted* a lexicographic definitions or even argued

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confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements." *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

<sup>40</sup> See again the Examiner's previous Office Action, Paper No. 7, Paragraph No. 10.

<sup>41</sup> The Examiner's request on this matter was reasonable on at least two separate and independent grounds: first, the Examiner's request was simply an express request for clarification of how Applicants intend their claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicants was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21<sup>st</sup> Century Strategic Plan, February 3, 2003 available at [www.uspto.gov/web/offices/com/strat21/index.htm](http://www.uspto.gov/web/offices/com/strat21/index.htm) (last accessed May 8, 2003).

<sup>42</sup> See also MPEP §2111 and §2111.01; *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc).

<sup>43</sup> See 37 C.F.R. §1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability . . . . [Emphasis added.]"

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lexicography in any paper of record, the Examiner concludes that lexicography (*i.e.* CCS Fitness Factor #1) is not invoked in the application.

#### **CCS Fitness Factor #2**

74. Factor #2 is also not at issue. Although prosecution disclaimer (and associated issues) may have its genesis in ex parte examination, the Examiner is unaware of a *single* case invoking prosecution disclaimer during ex parte examination. See *Omega Engineering Inc. v. Raytek Corp.*, 334 F.3d 1314, 67 USPQ2d 1321 (Fed. Cir. 2003) for an excellent discussion on this topic.

#### **CCS Fitness Factor #3**

75. Factor #3 is unavailable during ex parte examination. When interpreting indefiniteness under §112 2<sup>nd</sup> paragraph, the court in *Exxon Research and Engineering Co. v. U.S.*, 265 F.3d 1371, 60 USPQ2d 1272 (Fed. Cir. 2001) distinguished the role of the specification during ex parte examination from the role of the specification during inter partes litigation and cited *In re Wiggins*, 488 F.2d 538, 541-42, 179 USPQ 421, 423-24 (CCPA 1973) to support this important difference in claim interpretation theory.

76. In this case, because the claims *are* definite and thereby *not* rejected under 35 U.S.C. 112 2<sup>nd</sup> paragraph, Factor #3 is clearly not at issue.

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**CCS Fitness Factor #4**

77. Finally, Factor #4 §112 6<sup>th</sup> paragraph) is clearly not at issue in this case because Applicants chose not to recite "means" in any of their claims.<sup>44</sup> Moreover, Applicants have not even *attempted* to overcome the presumption that §112 6<sup>th</sup> paragraph is not invoked in any claim.

78. The MPEP also supports the Examiner's position that "in light of the specification" is interpreted to mean that *only* Factors #1 and #4 from *CCS Fitness* are available during ex parte examination. MPEP §2111.01 begins:

While the \*\* claims of issued patents are interpreted in light of the specification, prosecution history, prior art and other claims, this is *not the mode* of claim interpretation to be applied during examination. . . . It is *only when* the specification provides definitions for terms appearing in the claims that the specification can be used in interpreting claim language [*i.e.* Factor #1: Lexicography]. . . . There is one exception, and that is when an element is claimed using language falling under the scope of 35 U.S.C. 112, 6th paragraph (often broadly referred to as means or step plus function language) [*i.e.* Factor #4]. In that case, the specification must be consulted to determine the structure, material, or acts corresponding to the function recited in the claim. [Emphasis added. Citations omitted.]

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<sup>44</sup> "It is well settled that a claim limitation that actually uses the word 'means' invokes a rebuttable presumption that § 112, ¶ 6 applies. By contrast, a claim term that does not use 'means' will trigger the rebuttable presumption that § 112, ¶ 6 does not apply. The term 'means' is central to the analysis." *Apex Inc. v. Raritan Computer Inc.*, 66 USPQ2d 1444, 1450 (Fed. Cir. 2003) (internal citations and quotations omitted); "The use of the word 'means' triggers a presumption that the inventor used this term advisedly to invoke the statutory mandate for means-plus-function clauses. This presumption may be overcome in two ways. First, a claim element that uses the word 'means' but recites no function corresponding to the means does not invoke §112, ¶ 6. Second, even if the claim element specifies a function, if it also recites sufficient structure or material for performing that function, § 112, ¶ 6 does not apply." *Allen Engineering*, 299 F.3d at 1347, 63 USPQ2d at 1775 (internal quotations and citations omitted).

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Thus, the MPEP clearly states that during ex parte examination, the specification can be used to interpret the claims "only when" attempting to use either lexicography (Factor #1) and/or 35 U.S.C. §112 6<sup>th</sup> paragraph (Factor #4). In other words, Factor #2 and Factor #3 are *not* available during ex parte examination. So unless Applicants use either Factor #1 or Factor #4, Applicants can not use the specification to interpret their claims.

79. In conclusion, because Applicants have not properly used either *CCS Fitness* Factor #1 and/or *CCS Fitness* Factor #4 to incorporate their specification into the claims, the phrase "in light of the specification" in this particular case has in essence no legal effect.<sup>45</sup>

80. Applicants conclude their first argument by stating "The reasonable interpretation of the claim by someone of ordinary skill in the computer arts, consistent with the specification, is that the presence of a given food item in the refrigerator of Sone does not represent a database of preferences as claimed."<sup>46</sup> This is found unpersuasive.

81. As noted above, this conclusion fails to consider the *broadest* reasonable interpretation allowed by the Examiner. In fact, this "broadest reasonable interpretation" is not optional since examiners are *required* to interpret the claims with that standard. See *Spring Window Fashions LP v. Novo Indus., L.P.*, 323 F.3d 989, 994, 65 USPQ2d 1826, 1830 (Fed. Cir. 2003) ("[A]n examiner has the duty to police claim language by giving it the broadest reasonable

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<sup>45</sup> Because claim interpretation during ex parte examination is different than claim interpretation after issuance, *Morris*, the Examiner makes no findings as to how the claims are interpreted after issuance. "The business of the PTO is patentability, not infringement." *Hogan*, 559 F.2d at 607, 194 USPQ at 538.

<sup>46</sup> Applicant's Brief, Paper No. 15, Page 6.



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interpretation"). Furthermore, this argument of fashioning a meaning from Applicants' specification (or the prior art for that matter) was specifically rejected in *Morris*:

The appellants urge us to consult the specification and some of the cited prior art, including Brown, and interpret the disputed language more narrowly in view thereof. When read in light of this material, according to applicants, the "true" meaning of the phrase emerges. We decline to attempt to harmonize the applicants' interpretation with the application and prior art. Such an approach puts the burden in the wrong place. It is the applicants' burden to precisely define the invention, not the PTO's. *Morris*, 127 F.3d at 1056, 44 USPQ2d at 1029.

82. Using the Examiner's interpretations, the type, quantity, and amount of food-related items are clearly preferences. In fact, Sone describes these preferences as "desired inventory." For example, Figure 4 directly disclose four rolls of toilet paper. The Examiner finds that including four rolls of toilet paper (instead of 2 rolls or zero rolls of toilet paper), the number of canned goods, and whether or not milk is on the desired inventory list are clearly preferences of the user(s). In other words, Sone's desired inventory which is stored within an electronic storage device within computer 50 contains 'a list of food-related goods on hand that the user likes better or best.' If the user prefers a particular brand of milk as opposed to another brand of milk (or even orange juice for that matter), the user's particular brand of milk would be in the user's desired inventory. Applicant's arguments with respect to their first argument have been considered but are not persuasive.

*Applicant's Second Argument:*

83. Applicants' second argument assumes their first argument regarding 'preferences' is valid. If Applicants first argument fails because the Examiner can use his definition of "food-related inventory preferences" then Applicants' second argument must also fail because they have incorporated the same logic into their second argument. In particular, Applicants argue that "the Examiner has not cited a single teaching of Sone to support his position [that "food-related inventory preferences" are received "at said controller"], and further noting within Sone suggests, that computer (50)['s] disk drive contains "food-related inventory preferences for a particular user as 'preferences' is taught in the present specification and applied to the present claim language."<sup>47</sup>

84. This argument has been considered but is found not persuasive because clearly the CPU with personal computer 50 receives information from the various electrical storage components or devices within personal computer 50.

*Applicant's Third Argument:*

85. Applicants next argue that "nothing in Sone suggests, that the computer (50) disk drive, thereby containing such preferences, is 'carried on the person of said particular user proffered by said particular user at said controller,' as is recited in claim 15."<sup>48</sup> The Examiner respectfully disagrees.

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<sup>47</sup> Applicant's Brief, Paper No. 15, Page 7.

<sup>48</sup> Applicant's Brief, Paper No. 15, Page 7.

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86. First, if Applicants are attempting to distinguish their invention based upon the act of carrying upon "a user," a 35 U.S.C. §101 rejection may result because Applicants would be attempting to claim a human being. "If the broadest reasonable interpretation of the claimed invention as a whole encompasses a human being, then a rejection under 35 U.S.C. 101 must be made indicating that the claimed invention is directed to nonstatutory subject matter." MPEP §2105. The method step at issue is "receiving food-related inventory preferences . . . at said controller from a . . . device carried on the person of said particular user proffered by said particular user." The step requires that the device be at least capable of being carried on a user. In fact, Applicant's own specification does not disclose the controller performing the "receiving" step when the device is on the user. To the contrary, Applicants' specification describes how the device must be placed within Applicants' system for the second "receiving" step to occur. In other words, the device is not required to be "carried by the user" when the second "receiving" step occurs.

87. Finally, Applicants argue that the disk drive or memory is not "proffered by said user to the controller." This limitation is clearly met by Sone alone. If the storage device in personal computer 50 was not "proffered by said user to the controller" how do Applicants envision the data is exchanged? The storage device must be proffered for if it were not, it would be impossible to transfer data from the storage device to the CPU.

Alternatively, the "removable drives" or "floppy drives" of the personal computer in How Computer Work must be proffered to the controller in order for the information to be exchanged.

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88. Applicants' third argument has been considered but is also found not persuasive. The Examiner concludes that because Applicants have not overcome the prima facie case of anticipation, the Examiner respectfully requests that the anticipation rejections of all pending claims be affirmed.

***Applicant's Forth Argument:***

89. Applicants argue that the Examiner's motivation for the obvious rejections are improper because the Examiner has used "improper hindsight in light of the present application to find the present invention obvious."<sup>49</sup> While the Examiner agrees that improper hindsight would defeat motivation, the argument implies that the Examiner's motivation is *somewhere present in Applicants' own disclosure*. The Examiner's motivational statement was: "Such a modification would have made system profitable for the vendors and delivery persons since they would never make money if the system was for a single home." In this case, the Examiner can not locate in Applicants' disclosure the Examiner's motivation relating to delivery persons. For this reason alone, Applicants' arguments regarding hindsight are not persuasive.

***Applicant's Fifth Argument:***

90. Applicants' fifth argument makes numerous statements of law—some correct and some incorrect. For example, Applicants state, "This 'all limitations' rule applies even when the claim

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<sup>49</sup> Applicant's Brief, Paper No. 15, Page 8.

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as been rejected under 35 U.S.C. §112, first paragraph”<sup>50</sup> and cites *In re Grasselli* and MPEP 2144 to support their position.

91. However MPEP §2144 is titled “Sources of Rationale Supporting a Rejection Under 35 U.S.C. 103.” This section of the MPEP does not discuss the ‘all elements rule’ or application to 35 U.S.C. §112, 1<sup>st</sup> paragraph. For these reasons alone this argument is not persuasive.

MPEP 2143.03 discusses *Grasselli* but this discussion appears to be dicta or at least erroneous. To the extent that the MPEP is contrary to law, it is void. *In re Recreative Technologies Corp.*, 83 F.3d 1394, 38 USPQ2d 1776, 1779 (Fed. Cir. 1996)(noting that “[t]o the extent that M.P.E.P. Section 2258 enlarges the statutory authorization, it is void.”)(citations omitted).

92. Regarding *In re Grasselli*, a review of that case will reveal that the Board affirmed the written description requirement. *Grasselli*, 31 USPQ at 394. To this point and the basis for Applicants’ citation to *Grasselli*, the Examiner is confused. Again, in *Grasselli*, the written description rejection was *affirmed* while the obviousness rejection was reversed. In other words, the written description rejection remained regardless of whether or not the obviousness rejection was affirmed or reversed. For patentability purposes, whether or not the claims are rejected under §112 or §103 is immaterial for they are nevertheless rejected and can not be allowed. Applicants’ reliance on *Grasselli* appears to put form over substance. The result is the same—the claims are not allowed.

93. Applicants’ statement that “this is an extremely important omission from the Final rejection” misses the point. Additionally and contrary to Applicant’s statements, disk drives or

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<sup>50</sup> *Id.*

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other personal electronic digital data storage devices within personal computer 50 are removable and can be carried by a user. As previously noted, the *entire personal computer* can be carried by the user.

94. For this reason alone, Applicant's arguments are not persuasive.

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95. The Examiner requests the opportunity to present arguments at an oral hearing.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

*AJ Fischer* 7/30/04

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## APPENDIX

Table 1

CLAIM 15	Sone (U.S. 6,204,763 B1)
Receiving food-related inventory preferences for each of a plurality of users at a controller for a particular storage area that monitors current food-related inventory in said particular storage area.	Personal computer 50 receives inventory preferences from refrigerated and nonrefrigerated areas within household 10. The storage areas include 20A, 20B, and 20C. <u>The controller is the CPU</u> with the personal computer 50. The controller monitors the current food related inventory in the storage areas.
Receiving food-related inventory preferences for a particular user from among the plurality of users at said controller from a personal electronic digital data storage device carried on the person of said particular user proffered by said particular user.	<u>The controller (CPU)</u> receives food-related inventory preferences for a particular user or users (more than one person within household 10 can use the system). The preferences come from electronic storage device(s) within personal computer 50. Personal computer 50 is an ordinary personal computer having a removable drive, a diskette drive, a hard drive, and other storage devices.
Adjusting a current database of intended food-related inventory for said particular storage area at said controller according to said food-related inventory preferences.	The menu system within personal computer 50 or the display 42 with the touchscreen allows the user to set desired quantity thresholds and facilitates easy modification of the list of items to be replenished. Quantity thresholds are but one of many preferences. (e.g. Figure 4 discloses at least <i>four</i> rolls of toilet paper). Alternatively, the user may adjust the database by adding or deleting items from the desired inventory.
Determining a selection of food-related items from among said database of intended inventory items that are absent from said particular storage area, such that food-related inventory that is intended for said particular storage area is managed.	The system determines if one or more food-related items from within all the food-related items needs replenishing ( <i>i.e.</i> is absent). The new food-related items that are delivered to cabinet 12 are 'managed' (the current inventory is updated to reflect the delivery of the new food-related inventory items).

- Table 1: Claim 15 When Compared to Sone (U.S. Patent 6,204,763 B1)